Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM C. HINDENLANG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Contrary to the plain language of the Bankruptcy Code, and contrary to the decisions of numerous courts which have considered the issue, the Sixth Circuit Court of Appeals erroneously concluded that the Petitioner was precluded from a discharge of his tax obligations merely because he filed tax returns after the Internal Revenue Service had prepared "substitutes for returns" and had assessed the taxpayer for the obligations set forth in these returns. Therefore, this Petition presents the following question:

Is a Chapter 7 debtor precluded from obtaining a discharge of tax liabilities when the taxpayer files tax returns after the tax obligations have been assessed based upon "substitutes for returns" prepared by the Internal Revenue Service?

PARTIES TO THE PROCEEDINGS

Petitioner, William C. Hindenlang, was the Debtor in the Chapter 7 proceeding filed in the Bankruptcy Court. The Respondent is the United States of America, Internal Revenue Service, a defendant in the adversary proceeding filed by the Petitioner. The Chapter 7 Trustee was E. Hanlin Bavely.

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Petitioner, William C. Hindenlang, ("Petitioner") respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *In re William C. Hindenlang: United States of America v. William C. Hindenlang*, 164 F.3d 1029 (6th Cir. 1999) (App. A). The opinion of the United States District Court for the Southern District of Ohio is reported at *United States v. Hindenlang (In re Hindenlang)*, 214 B.R. 847 (S.D. Ohio 1997) (App. B). The opinion of the United States Bankruptcy Court for the Southern District of Ohio, Western Division, is reported at *United States v. Hindenlang (In re Hindenlang)*, 205 B.R. 874 (Bankr. S.D. Ohio 1997) (App. D).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") was entered on January 22, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Under 26 U.S.C. § 6011(a), titled the "[g]eneral requirement of return, statement, or list," the Internal Revenue Code provides:

> [w]*hen required by regulations* prescribed by the Secretary any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

Section 507(a)(8) reads:

> a tax on or measured by income or gross receipts —
>
> > (i) * * *;
> >
> > (ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax was made within 240 days after such assessment was pending, before the date of the filing of the petition; or
> >
> > (iii) * * *

Section 523(a)(1) of the Bankruptcy Code reads:

> (a) A discharge under § 727 . . . of this title does not discharge an individual debtor from any debt —
>
> > (1) for a tax or customs duty —
> >
> > > (A) of the kind and for the periods specified in § 507(a)(2) or 507(a)(8)

> of this title, whether or not a claim for such tax was filed or allowed;
>
> (B) with respect to which a return, if required —
>
> (i) was not filed; or
>
> (ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or
>
> (C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax.

Section 727 of the Bankruptcy Code reads:

> (a) The court shall grant the debtor a discharge, unless — * * *
>
> (b) Except as provided in § 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter[.]

STATEMENT OF THE CASE

The issue to be decided is whether the Court of Appeals erred when it concluded that the tax returns filed by the Petitioner were of no legal effect and Petitioner was thereby precluded from receiving a discharge, otherwise available under 11 U.S.C. § 727, of his tax liabilities under the exception contained in 11 U.S.C. § 523(a)(1)(B)(i). Both the Bankruptcy Court and the District Court concluded that the fact the Internal Revenue Service ("IRS") had prepared "substitutes for returns" ("SFRs") and had assessed the Petitioner for these tax obligations was irrelevant to the issue of whether the Petitioner was entitled to a discharge of tax liabilities under the Bankruptcy Code.

The Court of Appeals reversed the Decision of the District Court, concluding that the filing of a document purporting to be a tax return, after the IRS had prepared SFRs and had assessed the taxpayer for these tax obligations, could not, as a matter of law, constitute the filing of a "return" which would preclude a denial of the discharge under 11 U.S.C. § 523(a)(1)(B).

The Decision of the Court of Appeals is contrary to the plain, unambiguous language of the Bankruptcy Code and, moreover, there is no support for the Decision within the Internal Revenue Code. Additionally, the Decision of the Sixth Circuit is contrary to the decisions of a number of bankruptcy courts, district courts and a bankruptcy appellate panel which have considered the issue. Finally, the Decision impedes the intent of Congress to provide debtors, who have not been proven to have engaged in any fraudulent or willful misconduct, a fresh start from their financial difficulties. The Court of Appeals has added a significant burden, not set forth

in the Bankruptcy Code, to obtain a discharge of tax obligations — that the tax returns be filed prior to assessment.

This is a case of first impression for the Court. Although the Court has indirectly commented upon which documents may constitute tax returns, it has not resolved the exact issue presented in this proceeding — whether tax returns, filed after the taxes have been assessed, constitute tax returns so that a bankrupt taxpayer, who had failed to timely file the required tax returns, is not precluded from a discharge pursuant to § 523(a)(1)(B)(i). This requires an balancing of the right of debtors to a financial fresh start against the right of the government to collect tax obligations. The plain language of the Bankruptcy Code demonstrates that Congress intended to provide taxpayers, even taxpayers who fail to timely file tax returns, with a fresh start from their financial difficulties. Requiring tax returns be filed prior to assessment in order to be entitled to a discharge will not result in the fresh start contemplated by the Bankruptcy Code for an otherwise qualified debtor.

Therefore, Petitioner respectfully requests that the Court issue a Writ of Certiorari and reverse the Decision of the Sixth Circuit Court of Appeals.

A. Statement of Facts

Although he received income for the years in questions, the Petitioner failed to file tax returns for the tax years 1985 through 1989 and 1991 through 1992[1] by the annual deadline for the filing of those tax returns. The IRS contacted the

1. The parties agreed that the tax liabilities for the tax years 1989 and 1991 were dischargeable and the tax liabilities for the 1992 tax year were not dischargeable.

Petitioner through the use of "thirty-day" letters which proposed tax deficiencies for the tax years 1985 through 1988. The Petitioner did not respond to these letters. At the appropriate time, the IRS prepared, pursuant to 26 U.S.C. § 6020(b), SFRs for these tax years and forwarded the SFRs to the Petitioner to be signed and returned by the Petitioner. When no response was received, the IRS sent formal "notice of deficiency" letters for these years. When the Petitioner failed to respond to the notices, and failed to file a petition with the Tax Court within ninety days to challenge the notices, the IRS assessed the tax deficiencies, as set forth in the SFRs, against the Petitioner.

In December of 1993, Petitioner submitted tax returns, on forms prescribed by the IRS, to the IRS for the tax years in question. The tax returns submitted by the Petitioner were sworn to and contained sufficient information to calculate his tax obligations. The tax returns were received by the IRS on January 4, 1994. These tax returns mirrored the SFRs prepared by the IRS. Although he submitted the tax returns, he did not make any payments against the tax liabilities set forth in the returns. The IRS accepted the tax returns.[2]

On January 22, 1996, the Petitioner filed his petition for relief under Chapter 7 of the United States Bankruptcy Code. The adversary complaint which gave rise to this appeal was filed within that bankruptcy proceeding.

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2. The tax returns for the years 1991-1997 were submitted at the same time and the IRS has agreed to a discharge of the tax obligations for two of those years, even though the tax returns were not timely filed.

B. The Proceedings Below

The Petitioner filed his Complaint to Determine Dischargeability on February 9, 1996. The Complaint alleged that returns for the tax years in question had been properly filed, that the Petitioner was entitled to a discharge of the taxes pursuant to 11 U.S.C. § 727 and that none of the exceptions to discharge set forth in 11 U.S.C. § 523(a)(1) applied. The IRS filed its answer on March 14, 1996. In its Answer, the IRS defended the action and asserted that taxes were not dischargeable to the extent that the Petitioner had willfully attempted to evade or defeat the tax.[3] The IRS also asserted that the that the tax returns were not timely filed.

The matter proceeded through discovery, which consisted of the taking of Petitioner's deposition. Thereafter, both parties filed motions for summary judgment. Petitioner argued that he had filed tax returns and, therefore, the exception contained in 11 U.S.C. § 523(a)(1)(B)(i) did not apply. Petitioner further argued that, since the IRS neither argued nor offered any evidence that the Petitioner had willfully attempted to evade or defeat his tax obligations, the exclusion of 11 U.S.C. § 523(a)(1)(C) also did not apply.

In response, the IRS argued that the tax returns filed by the Petitioner did not constitute tax returns because they were filed after the IRS had assessed the taxes for the years in question. The IRS sought the establishment of a bright line test — that the filing of a tax return after the IRS had assessed the taxes in question would render the taxes at issue nondischargeable. By adopting a bright line test, the IRS

3. The IRS would *not* continue this argument in the proceedings on the motion for summary judgment or on appeal to the District Court of the Court of Appeals.

would avoid having to establish that the taxpayer had acted fraudulently or in a willful manner to evade or defeat the tax to preclude the discharge. Such a result is unsupported by the plain language of the Bankruptcy Code and is contrary to the intent of Congress as evidenced by the plain language of the Bankruptcy Code.

The Bankruptcy Court issued its decision on February 24, 1997. In its decision, the Bankruptcy Court concluded that the IRS had not met its burden[4] to establish an exception to discharge. The Bankruptcy Court, following this Court's decision in *United States v. Ron Pair Enterprises*, 489 U.S. 235 (1989), applied the plain language of 11 U.S.C. § 523(a)(1)(B) to conclude that this burden was not met. The Bankruptcy Court also concluded that to require tax returns be filed prior to assessment, in order to obtain the discharge, would impose a significant burden on debtors, a burden not specifically set forth in the Bankruptcy Code.

The IRS appealed the decision of the Bankruptcy Court to the District Court. Briefs were submitted by the parties which repeated the arguments made before the Bankruptcy Court. The District Court issued its decision on September 10, 1997 affirming the Decision of the Bankruptcy Court.

The IRS appealed the Decision of the District Court to the Court of Appeals. After the briefs were filed, the Court of Appeals heard oral argument. The Decision of the Court of Appeals was issued on January 22, 1999, which reversed the Decision of the District Court.

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4. There is no dispute that the IRS, as the party opposing the discharge, had the burden to prove by a preponderance of the evidence that an exception to discharge applied. *See, e.g., Grogan v. Garner*, 498 U.S. 279, 287 (1991).

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED AS THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE BANKRUPTCY CODE.

Section 727 of the Bankruptcy Code evinces Congressional intent that certain debts of individuals be discharged so that these individuals can obtain a fresh start from their financial difficulties. This Court has repeatedly stressed the importance of the "fresh start" afforded individual debtors under the Bankruptcy Code. *See, e.g., Stellwagen v. Clum*, 245 U.S. 605, 617 (1918). In fact, exceptions to discharge are to be narrowly construed. *See, e.g., In re Ward*, 857 F.2d 1082, 1083 (6th Cir. 1988). However, the discharge of debts, and the accompanying opportunity for a fresh start, is not unlimited. Congress included within the Bankruptcy Code standards to determine which debts shall not be discharged. These standards are set forth in Section 523(a) of the Bankruptcy Code.

With respect to unpaid tax liabilities, Congress elected to permit certain tax obligations to be discharged and other tax obligations not to be discharged. For example, if the debtor failed to file *any* tax returns, the debtor is not entitled to a discharge of the tax obligations. 11 U.S.C. § 523(a)(1)(B)(i). Additionally, if the IRS establishes that the taxpayer filed a fraudulent return or had "willfully attempted in any manner to evade or defeat such tax," then the tax obligations would not be discharged pursuant to 11 U.S.C. § 523(a)(1)(C).

Congress specifically permitted the discharge of taxes even where the tax returns were not timely filed. Section 523(a)(1)(B)(ii) permits a discharge of taxes for taxes due with respect to a return which was filed: (1) after the date on which the return was due; and (2) more than two years before the filing of the petition. This section does not impose the additional requirement that the tax returns be filed before assessment.

In deciding which tax obligations may be discharged, Congress was aware of the IRS assessment process and made a choice as to the affect of assessment on the availability of discharge.[5] Section 523(a)(1)(A) excepts from discharge those taxes specified in 11 U.S.C. § 507(a)(8). Section 507(a)(8)(ii) specifies taxes "assessed within 240 days . . . before the date of the filing of the petition." as being entitled to priority treatment and, under Section 523(a)(1)(A), exempt from discharge. Since Petitioner's tax obligations were assessed more than 240 days prior to the filing of his petition, the Court of Appeals erred in concluding that the tax obligations could not be discharged.

The provisions of the Bankruptcy Code which control the discharge of tax obligations are clear and unambiguous. Pursuant to the Court's decision in *Ron Pair*, and the decision of the Sixth Circuit in *In re Laurian*, 113 F.3d 595 (6th Cir. 1997), if a statute is clear and unambiguous, there is no need to look behind the statute for its meaning. Nothing in these sections indicate that the availability of a discharge from tax obligations relates to, or is impacted by, the process of the

5. Under the rule known as "the negative pregnant", it is presumed that Congress acted deliberately in choosing any such disparate treatment. *See, e.g., Gozlon-Peretz v. United States*, 498 U.S. 404 (1991).

IRS in issuing notices of tax deficiency, preparing SFRs and/or assessing tax obligations. Instead, the language of the Bankruptcy Code is clear — if the taxpayer files non-fraudulent tax returns prior to the filing of a bankruptcy petition, waits at least two years between the filing of the tax returns and the filing of the bankruptcy petition, then the taxpayer is entitled to a discharge of the tax liabilities *provided* that the taxpayer did not engage in any willful conduct to evade the payment of his tax obligations.

The Court of Appeals focused on the meaning of a "return" under both the Bankruptcy Code and the Internal Revenue Code, though neither specifically defines the term "return". This Court has provided guidance on what it, or is not a return. *See, e.g., Germantown Trust Co. v. Commissioner of Internal Revenue*, 309 U.S. 304 (1940); *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934). The courts which have adopted the reasoning of these decisions have established a four part test. In this case, the analysis turned on the fourth element, whether the return represented an "honest and reasonable attempt to satisfy the requirements of the tax law."[6] *See, e.g., Beard v. Commissioner*, 82 T.C. 766, 777 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986).

In this case, the facts are clear that the Petitioner complied with the provisions of the Internal Revenue Code, the Bankruptcy Code and the applicable case law and was entitled to a discharge of the tax obligations. Tax returns, on the forms prescribed by the IRS, were signed, sworn to, filed by the Petitioner and accepted by the IRS. The tax returns were filed

6. The other three elements, which are not in dispute in this case, are (1) the document must purport to be a return; (2) the document must be sworn to; and (3) the document must contain sufficient information to allow the calculation of the tax.

more than two years prior to the filing of the bankruptcy petition and were, on their face, regular. 11 U.S.C. § 523(a)(1)(C) has no application to this case because the IRS did not argue that the Petitioner engaged in willful conduct in an attempt to defeat or evade the tax. Accordingly, the Court of Appeals erred in concluding that Petitioner's tax obligations could not be discharged.

In reaching its decision, the Court of Appeals concluded that the tax returns filed by the Petitioner had to have a tax purpose to constitute a "return" and obtain a discharge from taxes pursuant to 11 U.S.C. § 523(a)(1)(B). However, there is no support in the Bankruptcy Code for such a conclusion. Additionally, the Court of Appeals did not cite any decision, opinion or legal authority to support its conclusion. By adding the requirement that tax returns be filed prior to assessment, the Court of Appeals has frustrated Congressional intent, as evidenced by the clear and unambiguous language of the Bankruptcy Code, that debtors may be entitled to a discharge of their tax obligations even though their tax returns are not timely filed.

Additionally, the conclusion of the Court of Appeals is not supported by the language of the Internal Revenue Code, which does not define what is, or what is not, an acceptable, timely tax return. The Internal Revenue Code merely requires that returns be filed and that the returns which are filed contain all the required information. 26 U.S.C. § 6011(a). The Internal Revenue Code does not provide when a return, not timely filed, can no longer be considered a return for tax purposes. Neither the parties nor the Court of Appeals were able to cite any decision of any court which sets forth such a holding. On these important questions of both bankruptcy and tax law, the Decision of the Sixth Circuit should not be the controlling authority.

Therefore, the Court should grant the Petition for Writ of Certiorari to review the Decision of the Court of Appeals and resolve these unanswered, significant questions of both bankruptcy and tax law.

II.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH A DECISION OF THE BANKRUPTCY APPELLATE PANEL FOR THE TENTH CIRCUIT AND WITH OTHER FEDERAL COURT DECISIONS.

Although this case presented a case of first impression before the Sixth Circuit Court, and is a case of first impression before the Court, other courts, at both the bankruptcy appellate level and below, have rendered decisions on this issue. Not only do these decisions cite the opinions of the Bankruptcy Court and District Court, these decisions also reject an alternative analysis provided by the courts of the Northern District of Ohio. While this case was proceeding through the appellate process, a decision on similar facts was rendered by the Bankruptcy Court and District Court of the Northern District of Ohio, *In re Mickens*, 215 B.R. 693 (Bankr. N.D. Ohio 1997), *aff'd*, 214 B.R. 976 (N.D. Ohio 1997), *aff'd*, *In re Mickens*, (No. 97-4163) __ F.3d __, 83 A.F.T.R. 2d 99-738 (6th Cir. Jan. 29, 1999). In *Mickens*, the District Court reached the opposite conclusion and decided that the tax obligation could not be discharged. However, the cases decided by other jurisdictions following *Hindenlang* and *Mickens* have cited *Hindenlang* as the more reasoned analysis of the issue.

In *In re Savage*, 218 B.R. 126 (10th Cir. BAP 1998), the 10th Circuit Bankruptcy Appellate Panel began its analysis with the plain language of the Bankruptcy Code. Since

Congress had excluded any reference to assessment in § 523(a)(1)(B)(i), unlike the reference to assessment in 11 U.S.C. § 507(a)(8)(A)(ii), the court would not add a reference to assessment to the statute regarding the discharge of tax obligations. The court in *Savage*, also relying upon Congressional intent, concluded that the fourth element of the *Beard* test was that the return "*on its face* constitute an honest and genuine endeavor to satisfy the law." *Id.*, at 132 (emphasis added) (citing S. Rep. No. 1106, 95th Cong., 2nd Sess. 22 (1978)). In this case, there was nothing on the face of the returns filed by the Petitioner which would have indicated that the returns were not an honest and genuine endeavor to satisfy the law.

In *In re Pierchoski*, 220 B.R. 20 (W.D. Pa. 1998), the Bankruptcy Court also concluded that § 523(a)(1)(B) does not contain any requirement that a return must be filed prior to the assessment of taxes by the IRS. To adopt the reasoning of the IRS, the bankruptcy court concluded, would lead to a conclusion in direct conflict with the express language of the Bankruptcy Code. *Id.*, at 24.

In *In re McGrath*, 217 B.R. 389 (Bankr. N.D. N.Y. 1997), the bankruptcy court agreed with *Hindenlang* that there is no provision in § 523(a)(1)(B) to deny a discharge on the sole basis that the return was filed after the tax obligations had been assessed. Instead, the court concluded that the appropriate statutory basis for such an analysis was under 11 U.S.C. § 523(a)(1)(C), which requires proof of a fraudulent return or proof that the taxpayer willfully attempted to evade or defeat the tax. *Id.*, at 394.

The courts in the above cases had two decisions to choose from, *Hindenlang* or *Mickens*. Each court has chosen the

Hindenlang analysis and Petitioner has been unable to find any reported decision decided prior to or after the Court of Appeals decision in *Hindenlang* which has adopted the *Mickens* analysis.[7] Therefore, the Court should grant Petitioner's Writ of Certiorari to resolve this split of authority between the Sixth Circuit and the Bankruptcy Courts, District Courts and Bankruptcy Appellee Panels of its sister circuits.

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7. The District Court for the Middle District of Tennessee has cited the District Court's decision in *Mickens* in *Gentry v. United States*, 223 B.R. 127 (M.D. Tenn. 1998), *aff'g. In re Gentry (Gentry v. United States)*, 214 B.R. 847 (Bankr. M.D. Tenn. 1997). However, the question at issue in *Gentry* concerned the sufficiency of the document filed by the taxpayer, not the timing of the filing of the proposed return.

CONCLUSION

This case presents a question of exceptional importance to both bankruptcy law, the availability of discharge, and to tax law, the collection of taxes. If the decision of the Court of Appeals is allowed to stand, many taxpayers, who have done nothing wrong other than to fail to timely file their tax returns, will be denied the opportunity to obtain the fresh start contemplated by the Bankruptcy Code. They will be denied the opportunity for a discharge, not because of any fraudulent, wrongful or willful misconduct, but for a variety of reasons. Contrary to the plain language of the Bankruptcy Code, the IRS will be able to collect post-discharge, the taxes without proving that the reason for the failure to file was a willful attempt to evade the payment of taxes. Unless and until Congress amends the Bankruptcy Code to grant the IRS this ability, the decision of the Court of Appeals must be reversed.

Accordingly, the Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND FILED JANUARY 22, 1999

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In re: WILLIAM C. HINDENLANG,

Debtor.

UNITED STATES OF AMERICA,
Appellant,

v.

WILLIAM C. HINDENLANG,
Appellee.

No. 97-4321

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 97-00372—Sandra S. Beckwith, District Judge.

Argued: October 30, 1998

Decided and Filed: January 22, 1999

Before: DAUGHTREY and MOORE, Circuit Judges;
COHN,* District Judge.

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*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix A

COUNSEL

ARGUED: Robert W. Metzler, U.S. DEPARTMENT OF JUSTICE, APPELLATE SECTION TAX DIVISION, Washington, D.C., for Appellant. William B. Fecher, REISENFELD & STATMAN, Cincinnati, Ohio, for Appellee. **ON BRIEF:** Robert W. Metzler, Kenneth L. Greene, U.S. DEPARTMENT OF JUSTICE, APPELLATE SECTION TAX DIVISION, Washington, D.C., for Appellant. William B. Fecher, Alan J. Statman, REISENFELD & STATMAN, Cincinnati, Ohio, for Appellee.

OPINION

KAREN NELSON MOORE, Circuit Judge. William C. Hindenlang, a Chapter 7 debtor in bankruptcy, seeks to discharge certain federal tax liabilities under 11 U.S.C. § 727. The United States argues that Hindenlang falls under the exceptions to discharge provision in 11 U.S.C. § 523(a)(1)(B), which prohibits discharge of taxes for which the debtor did not file a return. Here, Hindenlang filed Forms 1040 only after the Internal Revenue Service ("IRS") had calculated its own assessment of Hindenlang's liability by its authority under 26 U.S.C. § 6201, after which Hindenlang's late-filed forms served no purpose under tax law, and therefore the United States argues that his Forms 1040 were no longer "returns" under § 523(a)(1)(B). The district court ruled in favor of Hindenlang. We hold that Hindenlang's Forms 1040 were not returns, and we therefore **REVERSE** the judgment of the district court.

Appendix A

I. FACTS AND PROCEDURE

The basic facts are not in dispute. William Hindenlang did not file federal income tax returns for years 1985 through 1988. The IRS sent Hindenlang notice of proposed deficiency letters ("thirty-day letters") for years 1985 through 1987 in April of 1990, and one such letter for the 1988 taxable year in December of 1990. When the debtor did not consent to the proposed liability, the IRS prepared substitute returns ("Substitutes for Returns" or "SFRs") for the relevant years and sent them to Hindenlang. *See* 26 U.S.C. § 6020(b). Again Hindenlang neither responded to nor executed the SFRs, leading the IRS to send out formal notice of deficiency letters ("ninety-day letters").[1] Hindenlang did not file a petition in the Tax Court challenging any of these deficiency notices. Therefore, in 1991, after waiting the statutorily prescribed ninety days, the IRS assessed the deficiencies against Hindenlang.

Finally, in 1993, two years after assessment, Hindenlang sent the IRS what was purported to be individual income tax returns for the years in question.[2] Hindenlang used the proper Forms 1040, *see* 26 C.F.R. § 1.6012-1(a)(6), and calculated the taxes substantially the same as in the SFRs previously prepared by the IRS. Hindenlang still did not pay any of the deficiencies.

On January 22, 1996, Hindenlang filed a Chapter 7 bankruptcy petition. He then instituted an adversary proceeding seeking a bankruptcy court determination that the

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[1] Under 26 U.S.C. §§ 6212(a) and 6213(a), the taxpayer has ninety days after the notice of deficiency to petition the Tax Court for a redetermination of the deficiency, during which time the IRS may not assess the deficiency. Afterwards, the taxpayer must pay the tax and then may sue for a refund. *See* 26 U.S.C. § 7422(a) and 28 U.S.C. § 1346(a).

[2] Hindenlang filed his Forms 1040 as an individual owing taxes as a standard calendar-year taxpayer. Such returns normally must be filed by April 15 following the close of the calendar year. *See* 26 U.S.C. §§ 6012 & 6072.

tax liability in question was dischargeable pursuant to 11 U.S.C. § 727(a).[3] Both parties moved for summary judgment. The bankruptcy court granted summary judgment to Hindenlang, and the district court affirmed. *See United States v. Hindenlang* (*In re Hindenlang*), 214 B.R. 847 (S.D. Ohio 1997).

II. ANALYSIS

Bankruptcy court orders granting summary judgment are final appealable orders and are reviewable by the district court. *See Oakland Gin Co. v. Marlow* (*In re The Julien Company*), 44 F.3d 426, 428 (6th Cir. 1995). We have jurisdiction over bankruptcy appeals pursuant to 28 U.S.C. § 158(d), which authorizes appellate jurisdiction over final decisions of the district courts that reviewed bankruptcy court determinations pursuant to § 158(a).

A. Standard of Review

The issue of whether Forms 1040 filed after the IRS has made an assessment can constitute returns for purposes of § 523(a)(1)(B) is a question of law, to be reviewed de novo. *See Wesbanco Bank Barnesville v. Rafoth* (*In re Baker & Getty Fin. Servs.*), 106 F.3d 1255, 1259 (6th Cir.), *cert. denied*, --- U.S. ---, 118 S. Ct. 65 (1997). For purposes of summary judgment, this court must consider all the relevant facts in a light most favorable to the nonmoving party and determine whether the movant must prevail as a matter of law. *See General Elec. Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095, 1097 (6th Cir. 1994). There are no material disputed fact issues in this case, so we proceed to the legal issue.

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[3]Under § 727(a), "[t]he court shall grant the debtor a discharge, unless" the debtor falls within any of the applicable exceptions to discharge provisions of the bankruptcy code.

Appendix A

B. Definition of Return Under § 523(a)(1)

The issue in this case is the meaning of the word "return" under § 523(a)(1) of the Bankruptcy Code. The section reads:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt —
>
> (1) for a tax or a customs duty —
>
> (A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;
>
> (B) with respect to which a *return*, if required —
>
> (i) was not filed; or
>
> (ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or
>
> (C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax.

11 U.S.C. § 523(a)(1) (emphasis added).

Under this provision, when a debtor files for bankruptcy, "tax on or measured by income or gross receipts" for the last three taxable years is not dischargeable. *See* 11 U.S.C. §§ 507(a)(8)(A), 523(a)(1)(A). Furthermore, only taxes for which a return was filed more than two years before the petition for bankruptcy are dischargeable. *See* § 523(a)(1)(B)(ii). Finally, if "the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax," the tax is not dischargeable. *See* § 523(a)(1)(C).

This provision appears to serve two purposes. First, the requirement of a two-year waiting period after filing a late return but before seeking discharge prevents a debtor who has ignored the filing requirements of the Internal Revenue Code from waiting until the eve of bankruptcy, filing a delayed but

standard tax return form, and seeking discharge the next day. It is, in a sense, a provision affording notice and an opportunity to act, giving the IRS time to seek payment by levy or court proceeding. Second, § 523 forbids discharge when the debtor has acted fraudulently or in a manner calculated to evade or defeat a tax. This corresponds with the notion that "good faith and candor are necessary prerequisites to obtaining a fresh start." *Industrial Ins. Servs., Inc. v. Zick* (*In re Zick*), 931 F.2d 1124, 1129 (6th Cir. 1991) (citation omitted).

Hindenlang filed Forms 1040 for the years in question after the IRS had already made independent assessments of his tax liability. He waited the requisite two years required by § 523 before filing for bankruptcy. The government does not claim that the Forms 1040 were fraudulent in any respect. Finally, the government does not attempt to argue that the act of filing late Forms 1040, however delinquent, could be construed as an attempt to evade or defeat taxes due under § 523(a)(1)(C). The government's argument is that once a taxpayer has been assessed a deficiency, a Form 1040 submitted by the taxpayer to the IRS no longer qualifies as a return under § 523(a)(1)(B). We are left, therefore, with the threshold question of what constitutes a return under § 523(a)(1)(B) of the Bankruptcy Code.

We think it is appropriate to look to the Internal Revenue Code to determine the proper definition of return. The Bankruptcy Code simply adopts the term "return" without defining it further, and there is no reason to presume the Bankruptcy Code sought to encompass as a return any document, form, paper, or the like that would not qualify as a return under the applicable tax law.[4]

The Internal Revenue Code, which liberally uses the concept of returns, does not formally define "return." Under

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[4]We do not address the issue of the definition of return for purposes of § 523(a)(1)(B) when a taxpayer seeks to discharge state, municipal, or other tax liability.

26 U.S.C. § 6011(a), titled the "[g]eneral requirement of return, statement, or list," the Code provides:

> [w]hen required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

See also 26 C.F.R. § 1.6011-1(a), (b). Most individuals are required to file returns. *See* 26 U.S.C. § 6012. As the Supreme Court has stated, "[t]he purpose [of the return] is not alone to get tax information in some form but also to get it with such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished." *Commissioner v. Lane-Wells Co.*, 321 U.S. 219, 223 (1944). "[I]t is clear that the existing tax system could not function properly if the great majority of taxpayers did not report the correct amount of tax without the government's prior determination of tax liability." BERNARD WOLFMAN, JAMES P. HOLDEN, KENNETH L. HARRIS, STANDARDS OF TAX PRACTICE § 201 (1995). Although the general view is that substantial compliance is sufficient to comply with the law, *see* BORIS I. BITTKER & MARTIN J. MCMAHON, JR., FEDERAL INCOME TAXATION OF INDIVIDUALS § 40.1 (1988), the Internal Revenue Code does not specifically set out how accurate, thorough, or complete the requisite form must be in order to qualify as a return under the many sections of the Code that reference a return. The Code also does not specify when a late tax form will no longer qualify as a return under the tax law.

The district court applied a four-part test to determine whether a filing with the IRS constitutes a "return." In order for a document to qualify as a return: "(1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to

satisfy the requirements of the tax law." *Hindenlang*, 214 B.R. at 848.

This test was derived from two Supreme Court cases: *Germantown Trust Co. v. Commissioner*, 309 U.S. 304 (1940), and *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934). In *Germantown*, the Court was asked to decide whether a fiduciary Form 1041 filed by the petitioner, that stated no tax was due, qualified as a return under § 275(a) of the Revenue Act of 1932. *Id.* at 306. The determination would control the onset of the limitations period for assessing a deficiency. *Id.* at 307. The Court held "that where a fiduciary, in good faith, makes what it deems the appropriate return, which discloses all of the data from which the tax . . . can be computed," a proper return has been filed. *Id.* at 309. The Court in *Zellerbach*, also discussing the date at which the limitations period against the IRS begins to run for deficiency assessments, held that "[p]erfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such, and evinces an honest and genuine endeavor to satisfy the law." 293 U.S. at 180.

The Tax Court, in *Beard v. Commissioner*, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986), combined the principles of *Zellerbach* and *Germantown* to arrive at the four-part test quoted above. *See* 82 T.C. at 777. A number of bankruptcy courts, and others, have since adopted or approved of this basic format. *See, e.g., Billman v. Internal Revenue Serv.* (*In re Billman*), 221 B.R. 281, 282 (Bankr. S.D. Fla. 1998); *Pierchoski v. Internal Revenue Serv.* (*In re Pierchoski*), 220 B.R. 20, 24-25 (Bankr. W.D. Pa. 1998); *McGrath v. United States* (*In re McGrath*), 217 B.R. 389, 392 (Bankr. N.D.N.Y. 1997). *See also* 13 MERTENS, THE LAW OF FEDERAL INCOME TAX § 47.50 (1992) (citing *Zellerbach* and listing the same four-part test). Both parties in this case, and the district court below, applied the *Beard* test to define "return," and we will adopt it as the applicable test.

We next apply the four-part test to this case. First, there is no question that the Forms 1040 submitted by Hindenlang purported to be returns. Hindenlang used the proper form

required by IRS regulations and filed the completed forms with the IRS. Second, Hindenlang executed these forms under penalty of perjury. Third, the forms included all the data needed to calculate Hindenlang's tax liability. Indeed, as indicated above, the forms were simply mirror images of the Substitutes for Returns completed by the IRS. The disputed issue is whether Hindenlang's Forms 1040, filed after the IRS had made a formal assessment, "represent an honest and reasonable attempt to satisfy the requirements of the tax law." *Hindenlang*, 214 B.R. at 848.

The Bankruptcy Code does permit debtors who have filed late returns to obtain discharges of tax liability in certain situations. Even in this case, the IRS does not challenge the discharge of Hindenlang's 1989-91 taxes, for which Forms 1040 were also filed first in 1992, because no assessment had been made by the IRS. The district court rejected the government's contention that once an assessment has been made, this presumption of discharge even in the case of late-filed returns no longer stands, and the Form 1040 filed post-assessment is not a return as a matter of law. The district court concluded instead that a properly completed Form 1040, even one first filed after an assessment has been made, requires the government, as the party seeking an exception to discharge, to bring forward particularized evidence to show that Hindenlang's late-filed Forms 1040 did not constitute an honest attempt to comply with the tax law. *See Hindenlang*, 214 B.R. at 849. The district court then held that the government failed to meet this particularized evidence burden.

We disagree with the district court's conclusion that the burden of showing dishonesty under the fourth prong of the *Beard* test shifts to the government if the debtor files a facially valid IRS Form 1040 after IRS assessment. Although we agree that the burden of proving by a preponderance of the evidence an exception to discharge lies with the creditor, *see Grogan v. Garner*, 498 U.S. 279, 287 (1991); *Fegeley v. United States*, 118 F.3d 979, 983 (3d Cir. 1997), and that "exceptions to discharge are to be strictly construed in favor

of the debtor," *Fegeley*, 118 F.3d at 983, we hold that the government has met its burden in this case. We hold as a matter of law that a Form 1040 is not a return if it no longer serves any tax purpose or has any effect under the Internal Revenue Code. A purported return filed too late to have any effect at all under the Internal Revenue Code cannot constitute "an honest and reasonable attempt to satisfy the requirements of the tax law." Once the government shows that a Form 1040 submitted after an assessment can serve no purpose under the tax law, the government has met its burden.[5]

The district court concluded that the government must bring forth particularized evidence to show that the taxpayer did not file the Form 1040 in an honest and good faith attempt to comply with the tax law, even after an assessment has been made. *See Hindenlang*, 214 B.R. at 849. We conclude, however, that when the debtor has failed to respond to both the thirty-day and the ninety-day deficiency letters sent by the IRS, and the government has assessed the deficiency, then the Forms 1040 serve no tax purpose, and the government thereby has met its burden of showing that the debtor's actions were not an honest and reasonable effort to satisfy the tax law.[6]

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[5]The government suggests a hypothetical situation where a Form 1040 filed after assessment by the IRS could serve a tax law purpose. The government argues that if a taxpayer were to file a Form 1040 after an assessment, the document would constitute a return to the extent that it resulted in a higher tax obligation than the assessment, and presumably that additional amount would be dischargeable. The crux of this theory is that this hypothetical taxpayer made a good faith attempt to comply with the tax law to the extent of the additionally calculated tax. We are not faced with this issue and need not resolve it at this time.

[6]Our decision is not inconsistent with the Supreme Court's holding in *Badaracco v. Commissioner*, 464 U.S. 386 (1984). In *Badaracco*, the Court held that an amended and corrected return filed after a fraudulent return does not trigger the three-year statute of limitations for assessment under 26 U.S.C. § 6501(a). *Id.* at 394. Instead, once a false or fraudulent return has been filed, under § 6501(c)(1) the three-year statute of limitations is irrevocably tolled. *Id.* The Court specifically noted that *Zellerbach* did not render the fraudulent return a nullity. In *Badaracco*,

Hindenlang has not indicated any tax purpose under the Internal Revenue Code for filing his Forms 1040. Although filing a return commences a three-year statute of limitations on the Secretary's authority to enter an assessment, *see* 26 U.S.C. § 6501(a), a document purporting to be a return but filed after the assessment has already been made is too late to have any effect on this limitation. Furthermore, the Internal Revenue Code's ten-year limitation on the IRS's right to collect on the assessment through levy or judicial proceeding begins at the moment the assessment is made, regardless of whether a return was filed. *See* 26 U.S.C. § 6502(a)(1).

Hindenlang's purported return also would have failed to mitigate or absolve him from civil or criminal liability had the IRS sought to impose such liability. Willful failure to file a timely return is a misdemeanor under 26 U.S.C. § 7203. Late filing of a return or a document purporting to be a return does not remove this criminal liability. Failure to file a return without reasonable cause also subjects a delinquent taxpayer to a five-percent penalty per month up to a maximum of twenty-five percent of the taxes owed. *See* 26 U.S.C. § 6651(a)(1). Hindenlang filed his Forms 1040 with the IRS well past any time that would bring him under the twenty-five-percent maximum.

Under Hindenlang's theory, a person filing a Form 1040 after assessment would be better off in bankruptcy than someone who did not, even though the Form 1040 serves no tax purpose. Nothing in § 523(a)(1) of the Bankruptcy Code suggests that a document that does not qualify as a return under the Internal Revenue Code should nonetheless qualify as a return for purposes of bankruptcy discharge. Such a result would create an unjustifiable inconsistency in the law. We conclude that 11 U.S.C. § 523(a)(1), which refers to tax returns that are required by the Internal Revenue Code to be

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however, the Supreme Court refused to allow the taxpayers to declare their fraudulent filings null and void and thereby erase an undesirable consequence of their fraudulent acts.

filed, sought to encompass only those documents that would qualify as returns under the Internal Revenue Code.

We conclude that if a document purporting to be a tax return serves no purpose at all under the Internal Revenue Code, such a document cannot, as a matter of law, qualify as an honest and reasonable attempt to satisfy the requirements of the tax law.[7] Therefore the document is not a "return" for purposes of 11 U.S.C. § 523(a)(1)(B).

III. CONCLUSION

For the reasons stated above, we **REVERSE** the judgment of the district court.

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[7] We do not conclude that were Hindenlang able to show a tax purpose for filing a Form 1040 after the IRS has made an assessment, he would automatically satisfy the fourth prong of the *Beard* test. The government could still produce particularized evidence showing that such a late filing of a Form 1040 was neither an honest nor reasonable attempt to comply with the tax law. We save resolution of that hypothetical case for another day.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED AND FILED SEPTEMBER 10, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Bankruptcy Case No. 96-10250)

Case No. C-1-97-372

In re William C. Hindenlang,

Debtor.

United States of America,

Appellant,

v.

William C. Hindenlang,

Appellee.

OPINION and ORDER

This appeal from the February 24, 1997, decision of the United States Bankruptcy Court presents the following issue: whether the Bankruptcy Court correctly decided that Forms 1040 submitted by the Debtor for the tax years 1985 through 1988, after the Internal Revenue Service had assessed

deficiencies for those years, are tax returns that entitle the Debtor to a discharge for the corresponding tax liabilities. For the reasons that follow, the Court **AFFIRMS** the Bankruptcy Court's decision awarding summary judgment to the Debtor.

1. *Background*

The Debtor failed to file federal income tax returns for the tax years 1985 through 1988, *inter alia*. In 1991, the Internal Revenue Service assessed deficiencies for those years. Still, the Debtor did not pay the deficiencies. On December 3, 1993, the Debtor filed Forms 1040 for the tax years 1985 through 1988, without payment for the deficiencies reflected on the documents. On January 22, 1996, the Debtor filed his petition for relief pursuant to chapter 7 of the United States Bankruptcy Code.

After the Debtor filed his petition for relief, the parties filed cross-motions for summary judgment with respect to the dischargeability of the Debtor's tax deficiencies for the tax years 1985 through 1988. The Bankruptcy Court granted the Debtor's motion and denied Appellant's motion on the ground that the deficiencies were dischargeable pursuant to 11 U.S.C. §727(b) and none of the exceptions to dischargeability found in 11 U.S.C. §523(a) applied. Appellant appeals from that decision.

2. *Standard of Review*

The parties agree that this appeal presents a legal question and that the Court must undertake a *de novo* review. *See*

Appendix B

Baker & Getty Financial Services v. Rafoth, 106 F.3d 1255, 1259 (6th Cir. 1997).

3. *Analysis*

Appellant contends that the Bankruptcy Court erred in not concluding that the exception to dischargeability found at 11 U.S.C. §523(a)(1)(B) prevented the discharge of the Debtor's tax liability with respect to tax years 1985 through 1988. Pursuant to that exception

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) [of Title 11] does not discharge an individual debtor from any debt —
>
> (1) for a tax or a customs duty —
>
> * * *
>
> (B) with respect to which a return, if required —
>
> (i) was not filed.

Appellant contends that, while the Bankruptcy Code does not define the word "return," application of the definition of that term provided in *Germantown Trust Co. v. Commissioner*, 309 U.S. 304 (1944), establishes that the Forms 1040 filed by the Debtor on December 3, 1993, were not returns. Accordingly, Appellant argues, the Debtor did not file a return with respect to the 1985 through 1988 tax

years and is not entitled to a discharge of his tax liability for those tax years.

The parties agree that the definition of "return" as that word is used in 11 U.S.C. §523(a)(1)(B) is the one set forth in the *Germantown Trust* decision. In order to qualify as a return, a document must satisfy the following four criteria:

(1) it must purport to be a return;

(2) it must be executed under penalty of perjury;

(3) it must contain sufficient data to allow calculation of tax; and

(4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law.

Germantown Trust, 309 U.S. at 306-09.

As the party seeking an exception to discharge, Appellant bore the burden of proof with respect to the applicability of the §523(a)(1)(B)(i) exception before the Bankruptcy Court. *See Grogan v. Garner*, 498 U.S. 279, 291 (1991). As the party bearing the burden of proof, Appellant was required to introduce evidence in support of its claim of exception to dischargeability in order to avoid the entry of summary judgment in favor of the Debtor. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The basis of Appellant's appeal is the fourth *Germantown Trust* criterion: that a document is not a return unless it

represents an honest and reasonable attempt to satisfy the requirements of the tax laws. Appellant argues, in essence, that the Bankruptcy Court erred in concluding that the Forms 1040 filed by the Debtor on December 3, 1993, satisfied that requirement.

Before the Bankruptcy Court, Appellant sought a ruling as a matter of law on a factual issue, the honesty and reasonableness of the Debtor and his actions, but did not introduce evidence that would tend to prove that the Debtors' actions were not honest and reasonable attempts to satisfy the requirements of the tax laws. Appellant represented there, as it does here, that the Debtor has stated that he did not file the documents in December 1993 in an effort to comply with the tax laws but in order to avail himself of the discharge of the deficiencies in bankruptcy. Appellant did not, and does not, cite to any evidence in support of that representation, however. The Court has combed through the exhibits attached to Appellant's motion for summary judgment filed in the Bankruptcy Court and does not find the statement Appellant attributes to the Debtor.[1]

Absent evidence to support its contention that the fourth *Germantown Trust* criterion is not satisfied, Appellant could only defeat the Debtor's motion for summary judgment by establishing, as a matter of law, that no debtor filing what purports to be a return after the Internal Revenue Service has

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1. The copy of the transcript of the Debtor's deposition that Appellant filed with its motion for summary judgment includes only every other page of that transcript. In any event, Appellant did not refer the Bankruptcy Court to that transcript for the statement it attributes to the Debtor.

assessed a deficiency for the tax year in question could satisfy the fourth *Germantown Trust* criterion. Appellant offers no support for such a broad conclusion, and this Court does not conclude that such a delayed filing will always fail to satisfy the fourth *Germantown Trust* criterion. Accordingly, the Court concludes that Appellant failed to introduce evidence in support of a claim with respect to which it bore the burden of proof and failed to demonstrate that the claim was established as a matter of law. The Bankruptcy Court, thus, correctly awarded summary judgment to the Debtor.

4. *Conclusion*

For the foregoing reasons, the February 24, 1997, decision of the United States Bankruptcy Court is hereby **AFFIRMED.**

IT IS SO ORDERED.

s/ Sandra S. Beckwith
Sandra S. Beckwith
United States District Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED AND FILED SEPTEMBER 10, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

C-1-97-372

In re William C Hindenlang

Debtor

United States of America

Appellant

v.

William C Hindenlang

Appellee

JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT THE DECISION OF THE US BANKRUPTCY COURT TO AWARD SUMMARY JUDGMENT TO THE DEBTOR IS **AFFIRMED**.

Appendix C

THIS CASE IS TERMINATED PURSUANT TO ORDER OF THE COURT [DOC. 10].

September 10, 1997

Kenneth Murphy, Clerk
s/ [illegible]
Deputy Clerk

APPENDIX D — DECISION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT DATED AND FILED FEBRUARY 24, 1997

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 96-10250
Adv. No. 96-1028
Chapter 7

Judge Burton Perlman

In Re:

WILLIAM C. HINDENLANG

Debtor

WILLIAM C. HINDENLANG

Plaintiff

v.

UNITED STATES OF AMERICA

Defendant

Appendix D

DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

At Cincinnati, in said District, on February 24, 1997.

This adversary proceeding relates to the dischargeability of certain federal income tax debts in the plaintiff/debtor's Chapter 7 bankruptcy case filed on January 22, 1996. This court has jurisdiction of this matter pursuant to 28 U.S.C. §1334(b) and the General Order of Reference entered in this District. This is a core proceeding arising under 28 U.S.C. §157(b)(2)(F).

The plaintiff's complaint in this adversary proceeding requests a determination of the dischargeability of his federal income tax liability. In this complaint, plaintiff asserts that the following tax debts to the Internal Revenue Service ("IRS") were listed in his schedules and are dischargeable:

1985 –	$14,949.26
1986 –	21,621.64
1987 –	12,043.47
1988 –	16,879.65
1989 –	5,916.12
1991 –	4,524.61
1992 –	890.49

Plaintiff asserts in his complaint that he filed with the IRS the requested returns for the above years at least three years prior to the filing of his bankruptcy petition. Thus, he contends that the taxes are dischargeable under 11 U.S.C. §727(a). In response, IRS answers that any taxes due are

nondischargeable pursuant to 11 U.S.C. §523(a)(1), contending first, that the document filed by plaintiff cannot be regarded as a tax return, and, second, that the plaintiff's failure to file his 1985-1988 tax returns prior to being assessed by the IRS for those taxes prevents consideration of what was filed as being a tax return. The parties are now in agreement that the tax liabilities for 1989 and 1991 are dischargeable, and that the tax liability for 1992 is nondischargeable under 11 U.S.C. §523(a)(1) as a tax that was due within three years prior to the petition date.

Now before the court are cross-motions for summary judgment on the dischargeability of the tax liability for the years 1985-1988, and the parties' responses thereto. With his motion for summary judgment, plaintiff/debtor filed copies of amended Forms 1040 for the years here in controversy, 1985 through 1989. (In a Stipulation filed with the court, Document 14 in the file, the parties agree that these were received by IRS on December 6, 1993.) With its motion, IRS filed a number of exhibits, including the same forms submitted by plaintiff, and also Certificates of Assessment for each of the years 1985-1988 and also 1992; "30-day Letters" with attached proposed tax and penalties for each of the years 1985-1988; Notices of Deficiency for years 1985-1987; and a transcript of the deposition of plaintiff.

We find the following facts. The plaintiff did not timely file tax returns for the years 1985-1988. The IRS sent "30-day letters" to the plaintiff requesting that the plaintiff consent to the taxes which the IRS calculated with "Substitutes for Return" or explain why the tax liabilities should be different from the calculated amounts. These letters were sent on April

12, 1990 for the tax years 1985 and 1986, April 26, 1990 for the tax year 1987, and December 31, 1990 for the tax year 1988. The IRS then sent Notices of Deficiency to the plaintiff between August and December of 1990 requesting again that the plaintiff consent to its calculation of the taxes, or, in the alternative, that the plaintiff file a petition in the U. S. Tax Court within 90 days to avoid assessment of the taxes as calculated by the IRS. The plaintiff filed tax returns for the years 1985-1988 received by IRS on December 6, 1993. The documents filed by the plaintiff on December 6, 1993, were substantially similar to the "Substitutes for Return" earlier prepared by IRS. The parties have agreed that plaintiff's taxes for 1989 and 1991 are dischargeable, and that for 1992 is nondischargeable. What remains in issue is dischargeability of taxes for 1985, 1986, 1987 and 1988.

On these facts, plaintiff argues that the tax liability for the years 1985-1988 is dischargeable under 11 U.S.C. §727(a) because there is no basis for excepting the tax debt from discharge under 11 U.S.C. §523(a)(1). Plaintiff states that he filed tax returns for years 1985-1988 in December of 1993. He contends that because he actually filed returns and because this filing was more than two years prior to the filing of his bankruptcy petition the exceptions to discharge in §523(a)(1) do not apply. In addition, he contends that the exceptions incorporated into §523(a)(1) from 11 U.S.C. §507(a)(8) do not apply since the taxes from 1985-1988 were due more than three years prior to the petition date.

Addressing the dischargeability of the tax liability for the years 1985-1988, IRS contends in its memorandum that the taxes are nondischargeable under 11 U.S.C.

§523(a)(1)(B)(i) on the basis that no returns were filed by plaintiff. IRS argues that the documents which were received by IRS on December 6, 1993, were not returns because they were based on the IRS SFRs and were not self-assessed by plaintiff. Further, IRS asserts that because plaintiff's returns were filed after IRS assessed plaintiff's tax liability, plaintiff's right to file a return was extinguished, what plaintiff filed cannot be regarded as a return, and plaintiff's tax liability must be excepted from discharge under §523(a)(1)(B)(i).

A motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c), made applicable in bankruptcy by Fed.R.Bankr.P. 7056. The moving party bears the initial burden of showing that there is no issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324, 106 S.Ct. 2548, 2552-2553 (1986).

Under §523(a)(1)(A) of the Bankruptcy Code, taxes are excepted from discharge if they first became due within three years of the date of the bankruptcy petition. *See* 11 U.S.C. §507(a)(8). Section 523(a)(1)(B) further excepts from discharge taxes:

> **§ 523. Exceptions to discharge**
>
> (a) A discharge under section 721, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt —

Appendix D

(1) for a tax or a customs duty —

(B) with respect to which a return, if required —

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of filing of the petition.

The burden of proving that a debt is nondischargeable is on the party opposing discharge, here IRS. *In re Black*, 787 F.2d 503, 505 (10th Cir. 1986).

The first position of IRS with which we deal is its contention that, since the filings of tax returns were not based on self-assessment, they should not be regarded as tax returns. We hold this position to be without merit. Supreme Court precedent establishes that a proper return must have the following attributes: (1) it must purport to be a return; (2) it must be sworn to as such; (3) it must contain sufficient data to allow calculation of tax; and (4) it must appear on its face to constitute an honest and genuine endeavor to satisfy the law. *See Germantown Trust Co. v. Comm'r*, 309 U.S. 304,

60 S.Ct. 566 (1940); *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 55 S.Ct. 127 (1934); *see also Beard v. Comm'r*, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986).

The IRS does not appear to dispute that the returns submitted by plaintiff in 1993 were proper Forms 1040, were executed and sworn to by plaintiff, contained sufficient information to calculate the tax and were not facially irregular or otherwise fraudulent. In fact, the IRS accepted similar Forms 1040 for the years 1989 through 1992, which were filed on the same day as the Forms 1040 for the years 1985 through 1988. Moreover, the IRS does not assert that the form or substance of the returns interfered with the handling or verification of the tax returns. The first position of IRS fails.

The cases upon which IRS relies for a contrary conclusion in its first position we find unpersuasive. The case of *In re Arenson*, 134 B.R. 934 (Bankr. D. Neb. 1991) is distinguishable because in debtor's amended return after assessment, he contended that he had no liability whatever, while in the case at hand debtor admitted significant tax liability. Moreover, it is unclear whether the holding is based on infirmity in the type of forms filed, or untimeliness of the forms. In *In re Pruitt*, 107 B.R. 764 (Bankr. D. Wyo. 1989), debtor filed no return at all, so that case is simply inapposite to that before us here.

We turn then to the contention of IRS that plaintiff's amended returns should not be regarded as returns for dischargeability purposes because they were filed after the IRS had assessed his taxes for 1985-1988 and issued SFRs for those years. We find this contention also to be without

merit. When a statute is clear in its plain language, the court need not go any further in interpretation of the statute. *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031 (1989). The position of the IRS would result in this court placing a significant additional requirement on the taxpayer to avoid nondischargeability, that is, filing a return prior to assessment. Such a requirement is not expressed in the statute, and we will not interpret the statute to so require for a few additional reasons. *See In re Sullivan*, 200 B.R. 327, 331 (Bankr. N.D. Ohio 1996) ("The legislative history . . . suggests no reason to apply section 523(a)(1)(B) other than in accord with the ordinary meaning of its language").

First, we must start from the proposition that exceptions to discharge are to be narrowly construed. *In re Ward*, 857 F.2d 1082, 1083 (6th Cir. 1988) ("Exceptions to dischargeability are to be construed strictly"); *Werner v. Hofmann*, 5 F.3d 1170, 1172 (8th Cir. 1993); *In re Enis*, 149 B.R. 471, 474 (Bankr. N.D. Ohio 1992). Further, the IRS's argument requires a departure from the strict statutory language of §523(a)(1)(B)(i) which does not base the discharge of taxes on whether a return was filed prior to assessment. Such departures have been disfavored in the context of dischargeability of taxes. *See e.g., In re Smith*, 96 F.3d 800, 802 (6th Cir. 1996) ("We have been rather consistent in denying 'equitable' pleas to disregard the strict timing rules of the Tax and Bankruptcy Codes").

Second, 11 U.S.C. §523(a)(1)(B)(ii) provides a time requirement for filing a return for dischargeability purposes. In this section, the "2-year rule", Congress dealt specifically with the issue of when a return must be filed in order for the

tax liability for that year to be dischargeable. The section requires filing of a return more than two years prior to the petition date. The section makes nondischargeable any tax from a required return which:

> (ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition;

11 U.S.C. §523(a)(1)(B)(ii).

This 2-year rule sets a time line which debtors must observe to gain discharge of their taxes. The section does not include any language concerning the assessment of the tax. Instead, the section creates a bright-line rule which says that if the debtor's return was filed less than two years pre-petition, the associated taxes are nondischargeable. Congress chose not to place significance on the time of assessment. This intent is clear when considering that Congress was aware of the role of assessment in dischargeability by virtue of the requirements of 11 U.S.C. §507(a)(8)(A)(ii). The inclusion of assessment in this section, but not in §523(a)(1)(B), suggests that Congress intended to allow filing of returns regardless of whether assessment has occurred. *Lynch v. Johns-Manville Sales*, 710 F.2d 1194, 1197 (6th Cir. 1983) ("It is a fundamental rule of statutory construction that inclusion in one part of a congressional scheme of that which is excluded from another part reflects a congressional intent that the exclusion was not inadvertent").

In reaching the conclusion which we do, we find strong support in the decision of Judge David Snow in *In re Sullivan*,

200 B.R. 327 (Bankr. N.D. Ohio 1996). In *Sullivan*, the IRS sought to except from discharge taxes for years in which returns were not filed until after the 90-day period for filing a petition in the U.S. Tax Court had run, but prior to the assessment of the taxes by IRS. In *Sullivan*, IRS asserted an argument similar to that asserted here — tax returns filed after the period for challenging IRS's determination of tax liability are legally ineffective and therefore not returns for dischargeability purposes. The court expressly refused to address the exact question presently before this court, whether returns filed after assessment are "returns" for dischargeability purposes. *Id.* at 332. However, the reasoning of the court in *Sullivan* is helpful in the analysis of the present case.

The court in *Sullivan* rejected the IRS argument that a return filed after the 90-day period for the debtor to contest the IRS determination of debtor's tax liability was not a return for dischargeability purposes. *Id.* In reaching this conclusion, the court found that neither the plain language of §523(a)(1)(B), nor the legislative history of that section, was helpful to the IRS position that the time the debtor filed his return was critical in determining whether it was a "return" for dischargeability purposes. *Id.*

We perceive a balance in the dischargeability of taxes which should not be disturbed by the requirement which the IRS asks this court to impose upon debtors. The court in *Sullivan* identified this balance by stating:

> Section 523(a) reflects a compromise between conflicting objectives of bankruptcy and tax

> law — providing the debtor a fresh start and enforcing tax collections. The obligation for recent taxes is not dischargeable even though the debtor has filed all returns and paid all taxes to the extent of his ability. On the other hand old taxes are dischargeable unless the debtor is guilty of fraud or has willfully attempted to avoid or defeat the tax, 11 U.S.C. §523(a)(1)(C), or has failed to file a required return. 11 U.S.C. §523 (a)(1)(B)(i). In the latter situation, the debtor may still discharge the taxes in question if he files a late return and if more than two years expire before he files his bankruptcy case. *Id.*

Sullivan, 200 B.R. at 331.

We conclude, therefore, that the second ground of IRS for nondischargeability is without merit.

The authorities relied upon by IRS in support of its contention here under discussion are distinguishable. To support its argument that the documents filed by the plaintiff were not returns because they were filed after the time to self-assess, IRS cites *Blenheim v. Commissioner*, 125 F.2d 906, 910 (4th Cir. 1942) and *Plunkett v. Commissioner*, 118 F.2d 644, 650 (1st Cir. 1941). In *Blenheim*, the court applied a federal taxing statute applicable to foreign corporations. The court found that since the taxpayer did not timely file a return, it could not enjoy the benefits of the deductions and credits generally provided to foreign corporations. 125 F.2d at 910. In *Plunkett*, the court held that the taxpayer could not avoid penalties incurred due to nonfiling by simply filing a

late return. 118 F.2d at 650. Clearly, neither case stands for the proposition asserted by IRS in the present case. Further, no citations to the Internal Revenue Code for this proposition have been provided.

Additionally, IRS relies on the following cases, cases which we also find to be unpersuasive. The court in *In re Gentry*, 1995 WL 644045 (Bankr. M.D. Tenn. 1995) held in a brief, unreported decision, that the debtor submitted his returns "too late" to qualify as returns for discharge purposes; however, the court did not discuss the significance of the IRS assessment in making its determination that the returns were filed too late. *Id.* In *In re Gushue*, 126 B.R. 202 (Bankr. E.D. (Pa. 1991), the court found that a stipulated decision entered in the U.S. Tax Court did not constitute a return for purposes of §523(a)(1). The basis for the decision was not the timeliness of the filing, but the adequacy of the stipulation as a return. 126 B.R. at 204.

In light of the foregoing discussion, we hold that the plaintiff's tax liability for the years 1985 through 1988 is discharged. Thus, plaintiff's Motion for Summary Judgment will be granted and defendant's Motion for Summary Judgment will be denied.

s/ Burton Perlman
BURTON PERLMAN
U. S. BANKRUPTCY JUDGE

APPENDIX E — JUDGMENT ON DECISION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED AND FILED FEBRUARY 24, 1997

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 96-10250
Adv. No. 96-1028
Chapter 7

Judge Burton Perlman

In Re:

WILLIAM C. HINDENLANG

Debtor

WILLIAM C. HINDENLANG

Plaintiff

v.

UNITED STATES OF AMERICA

Defendant

JUDGMENT ON DECISION BY THE COURT

This proceeding having come on for hearing before the court, Honorable Burton Perlman, United States Bankruptcy

Judge, presiding, and the issues having been duly heard and a decision having been rendered,

It is Ordered and Adjudged that plaintiff's tax liabilities for the years 1989 and 1991 are dischargeable, and that the plaintiff's tax liability for the year 1992 is nondischargeable, and,

It is further Ordered and Adjudged that the motion of plaintiff for summary judgment that plaintiff's taxes for 1985, 1986, 1987 and 1988 are dischargeable is granted, and the motion of defendant on behalf of the IRS is denied.

s/ Burton Perlman
BURTON PERLMAN
U. S. BANKRUPTCY JUDGE

Supreme Court, U.S.
FILED
JUN 2

(2)

No. 98-1700

In the Supreme Court of the United States

WILLIAM C. HINDENLANG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an untimely tax return form filed after the Internal Revenue Service makes an assessment of tax, and which mirrors the Service's independent determination of liability, provides a basis for discharging the underlying tax liability in bankruptcy proceedings under Section 523(a)(1)(B) of the Bankruptcy Code, 11 U.S.C. 523(a)(1)(B).

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 164 F.3d 1029. The opinion and order of the district court (Pet. App. 13a-18a) is reported at 214 B.R. 847. The opinion of the bankruptcy court (Pet. App. 21a-32a) is reported at 205 B.R. 874.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1999. The petition for a writ of certiorari was filed on April 22, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner did not file federal income tax returns for 1985 through 1988 (Pet. App. 3a, 14a, 23a). When petitioner failed to respond to the request that he file returns for those years, the Internal Revenue Service sent notices of proposed deficiencies to petitioner based on information about his income obtained from employers, banks, and other parties (*ibid.*). The debtor did not consent to the tax liabilities determined in the notices of deficiency (*ibid.*).

Pursuant to 26 U.S.C. 6213(a), the Internal Revenue Service was prohibited from assessing the tax deficiencies for 90 days after the notices of deficiency were sent to petitioner. In 1991, after the 90-day period expired, the Service assessed the taxes owed by petitioner for the years 1985 through 1988 (Pet. App. 3a).

2. A debtor who files a petition in bankruptcy under Chapter 7 is generally discharged from personal liability for all debts incurred before the filing of the petition. 11 U.S.C. 727(b). Under Section 523 of the Bankruptcy Code, however, certain debts are not dischargeable. In particular, Section 523(a)(1)(B)(i) provides that a discharge under Section 727 "does not discharge an individual debtor from any debt * * * for a tax * * * with respect to which a return, if required * * * was not filed." 11 U.S.C. 523(a)(1)(B)(i).

In December 1993, two years after the Internal Revenue Service assessed the tax liabilities involved in this case, petitioner sent the Service completed income tax return Forms 1040 for the years 1985 through 1988, which calculated the taxes owed for those years in substantial agreement with the notices of deficiency the Service had previously issued (Pet. App. 3a). When petitioner thereafter filed a Chapter 7 bankruptcy peti-

tion, he sought a determination that his tax liabilities for 1985 through 1988 were dischargeable pursuant to 11 U.S.C. 727 (Pet. App. 3a-4a). The government opposed petitioner's request, contending that the tax liabilities were excepted from discharge under 11 U.S.C. 523(a)(1)(B)(i) because petitioner had not, in compliance with the statute, filed a "return" for the years in question (Pet. App. 22a-23a). The bankruptcy court concluded, however, that the untimely Forms 1040 that petitioner submitted after the deficiency assessments were made by the Service constituted tax "returns" within the scope of Section 523(a)(1)(B)(i). The court therefore granted summary judgment to petitioner (*id.* at 21a-32a), and the district court affirmed (*id.* at 13a-18a).

3. Explaining that the issue presented in this case is "what constitutes a return under § 523(a)(1)(B) of the Bankruptcy Code" (Pet. App. 6a), the court of appeals reversed (*id.* at 1a-12a). The court concluded that it is appropriate to look to tax law to determine what constitutes a valid "return" for purposes of Section 523, because the Bankruptcy Code does not define the term and there is "no reason to presume the Bankruptcy Code sought to encompass as a return [a] document * * * that would not qualify as a return under the applicable tax law" (*id.* at 6a). Looking to the tax law, the court noted that "[t]he purpose [of the return] is not alone to get tax information in some form but also to get it with such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished" (*id.* at 7a (quoting *Commissioner* v. *Lane-Wells Co.*, 321 U.S. 219 (1944))). The court of appeals therefore applied the "four part test" that courts have routinely applied in determining whether a document submitted by a

taxpayer constitutes a "return" for purposes of the tax law (*id.* at 7a-8a):

> (1) [the document] must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law.

The court of appeals focused on the fourth part of this test: whether the Forms 1040 filed by petitioner after the Service had already made deficiency assessments, and which merely mirrored the Service's prior determinations, represented an honest and reasonable attempt to satisfy the requirements of the tax law. The court concluded that (Pet. App. 10a):

> when the debtor has failed to respond * * * to the * * * deficiency letters sent by the IRS, and the government has assessed the deficiency, then the Forms 1040 serve no tax purpose, and the government thereby has met its burden of showing that the debtor's actions were not an honest and reasonable effort to satisfy the tax law.

Because, on the particular facts of this case, there was no "tax purpose" for filing the belated Forms 1040, those filings did not constitute "returns" within the meaning of the discharge provisions of Section 523 of the Bankruptcy Code (*id.* at 11a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. In creating categories of debts that are excepted from the general discharge granted under the Bankruptcy Code, "Congress * * * concluded that the creditors' interest in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start." *Grogan* v. *Garner*, 498 U.S. 279, 287 (1991). Recognizing that "[o]ur system of taxation is based on voluntary assessment" (*Flora* v. *United States*, 362 U.S. 145, 176 (1944)) and "works to the extent that the majority of taxpayers think [it is] fair" (S. Rep. No. 989, 95th Cong., 2d Sess. 14 (1978)),[1] Congress enacted Section 523(a)(1)(B)(i) to deny a discharge in bankruptcy for taxes for which the debtor failed to file a required "return." Nothing in the Bankruptcy Code provides a definition of what constitutes a valid "return" for the purpose of this discharge provision. Because this exception to discharge is manifestly designed to protect the integrity of the tax system (S. Rep. No. 989, *supra*, at 13-15) and because, as the court of appeals stated, "there is no reason to presume the Bankruptcy Code sought to encompass as a return any document, form, paper, or the like that would not qualify as a return under the applicable tax law" (Pet. App. 6a), the court correctly concluded that it should

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[1] The Internal Revenue Code imposes an income tax on millions of persons every year and generally relies on the voluntary reporting and assessment of the tax by those who must pay it. *Commissioner* v. *Lane-Wells Co.*, 321 U.S. 219, 223 (1944); *Flora* v. *United States*, 362 U.S. 145, 176 (1960); S. Rep. No. 989, *supra*, at 14. The tax return "implements the system of self-assessment." *Commissioner* v. *Lane-Wells Co.*, 321 U.S. at 223. As the court of appeals emphasized (Pet. App. 7a), our tax system could not function if the great majority of taxpayers did not report the correct amount of tax and instead forced the government to determine their tax liability without a return.

look to tax law to determine what constitutes a "return" for purposes of Section 523(a)(1)(B)(i).

This Court has long recognized that the purpose of a return is "to get tax information" and "to get it with such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished." *Commissioner* v. *Lane-Wells Co.*, 321 U.S. at 223. Obviously, the purpose of a required tax return is not accomplished when, as here, petitioner provided no information about his tax liabilities prior to their assessment and forced the Internal Revenue Service to invoke deficiency procedures to make the tax determination and assessment. By filing an untimely document that simply mirrors the Service's determination, petitioner failed to participate in the self-assessment procedures upon which our tax system is based.

The court of appeals correctly applied the four-part test that courts have routinely employed in determining whether a document alleged to be a return is effective as a return. See Pet. App. 8a (citing *e.g.*, *Beard* v. *Commissioner*, 82 T.C. 766 (1984), aff'd, 793 F.2d 139 (6th Cir. 1986)). As the court of appeals concluded (Pet. App. 11a), petitioner did not satisfy that test because he failed to demonstrate that he was attempting to conform to any requirement of the tax laws in submitting the untimely Forms 1040.

> [W]hen the debtor has failed to respond * * * to the * * * deficiency letters sent by the IRS, and the government has assessed the deficiency, then the Forms 1040 serve no tax purpose, and the government thereby has met its burden of showing the debtor's actions were not an honest and reasonable effort to satisfy the tax law.

Id. at 10a. Indeed, it was evident that petitioner, who failed to file timely returns and refused to cooperate with the Internal Revenue Service in the making of the assessments, belatedly tendered documents that purported to be returns solely in an effort to obtain a discharge in bankruptcy. An untimely filing made in this context does not constitute a "return" because it does not "represent an honest and reasonable attempt to satisfy the requirements of the tax laws" (*id.* at 7a-8a).[2]

2. Petitioner errs in contending (Pet. 13-15) that there is a conflict of decisions that justifies review by this Court of the question presented in this case. The alleged conflict of three bankruptcy court decisions cited by petitioner does not warrant review by this Court.

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[2] Petitioner incorrectly contends that "the plain, unambiguous language" of Section 523(a)(1)(B) of the Bankruptcy Code requires that he be discharged of his unpaid tax liabilities. Pet. 4. That contention "begs the question of what constitutes a 'tax return.'" *In re Mickens*, 214 B.R. 976, 978 (N.D. Ohio 1997), aff'd, 173 F.3d 855 (6th Cir. 1999) (Table). The concession that petitioner ultimately makes that the Bankruptcy Code does not "specifically define[] the term 'return'" (Pet. 11) contradicts his contention that "the plain, unambiguous language" of the Bankruptcy Code is dispositive.

Petitioner further errs in asserting that the Bankruptcy Code requires the government to "establish that the taxpayer had acted fraudulently or in a willful manner to evade or defeat the tax to preclude the discharge" (Pet. 8). The nondischarge provision for fraudulent actions in which "the debtor * * * willfully attempted in any manner to evade or defeat" the tax (11 U.S.C. 523(a)(1)(C)) is separate and distinct from the nondischarge provision for the failure to file a "required" "return" (11 U.S.C. 523(a)(1)(B)) which is involved in this case.

In *In re Savage*, 218 B.R. 126 (B.A.P. 10th Cir. 1998), the bankruptcy appellate panel emphasized that it was not addressing the argument that the "return" involved in that case failed to satisfy the four-part test relied on in the present case, for the government "apparently did not raise this argument before the Bankruptcy Court" in that case. *Id.* at 133. The *Savage* court thus reserved, and did not decide, the specific question addressed and resolved by the court of appeals in the present case.

The bankruptcy court decision in *In re Pierchoski*, 220 B.R. 20 (Bankr. W.D. Pa. 1998), on which petitioner relies, has been vacated. *United States* v. *Pierchoski*, 99-1 U.S. Tax Cas. (CCH) ¶ 50,406 (W.D. Pa. Mar. 15, 1999). It manifestly does not establish a conflict. And, the bankruptcy court decision in *In re McGrath*, 217 B.R. 389, 392-393 (Bankr. N.D.N.Y. 1997), is not persuasive, for that court relied principally on the bankruptcy court decision in the present case which the court of appeals has now reversed. The decision in the present case appears to be one of first impression in the courts of appeals. It creates no conflict among the circuits that warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1999